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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 CURTIS POWELL,

11 Plaintiff,

12 v.

13 NANCY A BERRYHILL, Deputy  
14 Commissioner of Social Security for  
Operations,

15 Defendant.

CASE NO. 3:17-CV-05903-DWC

ORDER GRANTING MOTION FOR  
ATTORNEY'S FEES

16 Plaintiff filed a "Motion for Award of EAJA Fees and Expenses" ("Motion"), seeking  
17 attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Dkt. 18.  
18 Defendant objects to the Motion, contending Defendant's position in the underlying case was  
19 substantially justified. Dkt. 19.

20 The Court concludes Defendant's position was not substantially justified. Accordingly,  
21 Plaintiff's Motion (Dkt. 18) is granted.

22 BACKGROUND

23 On May 3, 2018, the Court found the ALJ erred by failing to fully and fairly develop the  
24 record. Dkt. 16. The Court found the ALJ's error was harmful, reversed the ALJ's decision, and

1 remanded the case to the Social Security Administration (“Administration”) for further  
2 consideration pursuant to sentence four of 42 U.S.C. § 405(g). *Id.*

3 On June 26, 2018, Plaintiff filed the present Motion. Dkt. 18. Defendant filed a Response  
4 on July 5, 2018. Dkt. 19. Plaintiff filed a Reply on July 12, 2018. Dkt. 20.

### 5 DISCUSSION

6 In any action brought by or against the United States, the EAJA states “a court shall award  
7 to a prevailing party other than the United States fees and other expenses . . . unless the court finds  
8 that the position of the United States was substantially justified or that special circumstances make  
9 an award unjust.” 28 U.S.C. § 2412(d)(1)(A). According to the United States Supreme Court, “the  
10 fee applicant bears the burden of establishing entitlement to an award and documenting the  
11 appropriate hours expended.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government  
12 has the burden of proving its positions overall were substantially justified. *Hardisty v. Astrue*, 592  
13 F.3d 1072, 1076 n.2 (9th Cir. 2010) (citing *Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir. 1995)).  
14 Further, if the government disputes the reasonableness of the fee, it also “has a burden of rebuttal  
15 that requires submission of evidence to the district court challenging the accuracy and  
16 reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted  
17 affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (citations omitted). The  
18 Court has an independent duty to review the submitted itemized log of hours to determine the  
19 reasonableness of hours requested in each case. *See Hensley*, 461 U.S. at 433, 436-37.

#### 20 **I. Substantially Justified**

21 In this matter, Plaintiff was the prevailing party because he received a remand of the  
22 matter to the Administration for further consideration. *See* Dkts. 16, 17. To award a prevailing  
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1 plaintiff attorney's fees, the EAJA also requires finding the position of the United States was not  
2 substantially justified. 28 U.S.C. § 2412(d)(1)(B).

3       The Supreme Court has held "substantially justified" means "'justified in substance or in  
4 the main' -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v.*  
5 *Underwood*, 487 U.S. 552, 565 (1988). A "substantially justified position must have a reasonable  
6 basis both in law and fact." *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (citing  
7 *Pierce*, 487 U.S. at 565; *Flores*, 49 F.3d at 569). The Court "'must focus on two questions: first,  
8 whether the government was substantially justified in taking its original action; and second,  
9 whether the government was substantially justified in defending the validity of the action in  
10 court.'" *Id.* at 1259 (quoting *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)). Thus, for the  
11 government to prevail, it must establish both the ALJ's underlying conduct and its litigation  
12 position in defending the ALJ's error were substantially justified. *Id.* "[I]f 'the government's  
13 underlying position was not substantially justified,'" the Court must award fees and does not  
14 have to address whether the government's litigation position was justified. *Tobeler v. Colvin*, 749  
15 F.3d 830, 832 (9th Cir. 2014) (quoting *Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir. 2013)). The  
16 Court notes the Administration does not have to prevail on the merits for the Court to conclude  
17 the Administration's position was substantially justified. *See Kali*, 854 F.2d at 334.

18       Here, the Court concluded the ALJ erred when he failed to fully and fairly develop the  
19 record. Dkt. 16. Specifically, the Court found the ALJ failed to fully and fairly develop the  
20 record because he afforded significant weight to medical opinion evidence from Dr. Eugene  
21 Kester, M.D., yet failed to follow Dr. Kester's recommendation that Plaintiff undergo another  
22 consultative examination. *Id.* at 5. The Court also found the ALJ's error harmful. *Id.* at 6-7. Due  
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1 to the ALJ's harmful error, the Court reversed the ALJ's decision denying benefits and remanded  
2 the case for further proceedings. *Id.*

3 This is not the exceptional case where the subtle differences between the substantial  
4 evidence and substantial justification standards merit remand and reversal without awarding  
5 attorney fees and costs. Instead, this Court's "holding that the agency's decision . . . was  
6 unsupported by substantial evidence is . . . a strong indication that the position of the United  
7 States . . . was not substantially justified." *Meier*, 727 F.3d at 872. Further, there are no special  
8 circumstances that render an EAJA award unjust.

9 The Court is not persuaded by Defendant's Response to the Motion. Dkt. 19. Rather,  
10 Defendant is attempting to re-litigate issues raised in the briefing on the merits of this case.

11 For the above stated reasons, the Administration has not shown substantial justification.  
12 Further, there are no special circumstances which render an EAJA award in this matter unjust. The  
13 Court therefore finds Plaintiff is entitled to attorney's fees under the EAJA. *See Meier*, 727 F.3d at  
14 872; *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007) ("we have consistently held that regardless of  
15 the government's conduct in the federal court proceedings, unreasonable agency action at any level  
16 entitles the litigant to EAJA fees"); *Toebeler*, 749 F.3d at 834 ("[b]ecause the government's  
17 underlying position was not substantially justified, we award fees, even if the government's  
18 litigation position may have been justified") (emphasis in original).

## 19 **II. Reasonableness of Fee**

20 Once the Court determines a plaintiff is entitled to a reasonable fee, "the amount of the  
21 fee, of course, must be determined on the facts of each case." *Hensley*, 461 U.S. at 429, 433 n.7.  
22 Here, Defendant does not challenge the reasonableness of the fee. *See* Dkt. 19. Further, based on  
23 the facts and circumstances of this matter, and the briefing and attorney time sheet, the Court  
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1 concludes the amount of time incurred by Plaintiff's attorney in this matter is reasonable. *See*  
2 Dkts. 18, 20-1. The Court finds Plaintiff's request for costs in the amount of \$400, and attorney's  
3 fees in the amount \$3,561.90, representing 18.1 hours of work, reasonable. *See* Dkts. 18, 20-1;  
4 *see also Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 157 (1990) (fees for time and expenses  
5 incurred in applying for fees were covered in EAJA cases).

6 CONCLUSION

7 For the above stated reasons, the Court hereby grants Plaintiff's Motion (Dkt. 18) as  
8 follows:

9 Plaintiff is awarded costs in the amount of \$400.00.

10 Plaintiff is awarded attorney's fees in the amount of \$3,561.90, representing 18.1 hours  
11 of work, for a total award of \$3,961.90, pursuant to the EAJA and consistent with *Astrue v.*  
12 *Ratliff*, 560 U.S. 586 (2010).

13 The Acting Commissioner shall contact the Department of Treasury to determine if the  
14 EAJA Award is subject to any offset. If the U.S. Department of the Treasury verifies to the  
15 Office of General Counsel that Plaintiff does not owe a debt, the government shall honor  
16 Plaintiff's assignment of EAJA Award and pay the EAJA Award directly to Tom O'Neill,  
17 Plaintiff's counsel. If there is an offset, any remainder shall be made payable to Plaintiff, based  
18 on the Department of the Treasury's Offset Program and standard practices, and the check shall  
19 be mailed to Plaintiff's counsel, Tom O'Neill, P.O. Box 336, Longview, Washington 98632.

20 Dated this 3rd day of August, 2018.

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23 David W. Christel  
24 United States Magistrate Judge